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State of New Hampshire
OFFICE OF ATTORNEY-GENERAL

January 16, 1956

His Excellency, the Governor
and the Honorable Council

Gentlemen:

The Secretary of State has advised me by letter of December 30 that at the meeting of the Governor and Council held on December 30, 1955, you requested that I personally reply to the questions below prior to the meeting of the Governor and Council of January 16, 1956. I am accordingly setting forth herewith each of the questions together with my answers thereto.

1. Can the Milk Control Board, under the law, set producer prices without setting resale or consumer prices?

A. No. The statute (RSA 183:7) specifically directs the Board upon a certain finding of fact as more fully described therein, to fix ". . . just and reasonable minimum or maximum prices, or both, that shall be paid producers . . . and . . . prices charged consumers . . . by distributors . . ." (Emphasis supplied) The conjunctive in relation to matters of price is used in the same statute paragraph and sentence in which the same Legislature used the word "or" in reference to price fixing by the Board. Therefore as a matter of simple statutory construction it is my opinion that the statute requires the Board to set both producers' prices and distributors' prices to consumers if it is to set either.

However, in this connection it is believed as of no little consequence that the statute is silent in terms of price formula

or price proportion other than that they must be "just and reasonable." Thus while the Board must act both in order to act either, it may establish a producer's price, and other than the limitation expressed by the Unfair Sales Act (RSA 358) which requires certain mark-ups, it may establish minimum and maximum consumers' prices, at such a reasonable range as in its discretion it believes is designed to accomplish the degree of public protection which is both the purpose and the policy of the statute so long as evidence before the Board supports the action taken. If the Board wishes it may establish a separate grade and class for raw milk with a separate producer and consumer price for raw milk as distinct from pasteurized. (RSA 183:8) Thus, for example, if the Board so finds it may set a producer's minimum and maximum price and then is free to set the price to consumers at any range consistent with the statute and complying with the restrictions of the Unfair Sales Act (RSA 358).

2. Does the Milk Control Board exceed its authority under the law by establishing prices in areas where there has been no substantial evidence presented that the public health is endangered by an inadequate supply of milk of proper quality? In your opinion what, under the law, constitutes substantial evidence?

A. This question is incapable of receiving a yes or no answer because it does not correctly set forth the questions of fact before the Board which it must find to be a fact before it can act under RSA 183:7. The reason for this is that the question fails to include the threat of impairment or deterioration of the public health in the future within the conditions permitting action by the Board. RSA 183:7 speaks not only of a finding that the public health is menaced or jeopardized but also of a finding that it is "likely to be impaired or deteriorated" which can only mean in future. Thus, the Board has the power to set producer and consumer prices under RSA 183:7 whenever it finds as a fact after public hearing upon substantial evidence either that the public health is presently menaced or jeopardized by loss or substantial lessening of supply of milk of proper quality in a specified market, or that the public health is "likely to be impaired or deteriorated" by such a loss if it fails to act.

This is the language of the General Court. It is believed to be constitutional. (Cf. Opinion of the Justices, 88 N.H. 497 [1937]) It is in fact legally presumed to be constitutional. Bowman v. Parker, 84 N.H. 550, 551. Arguments for its change are for the Legislature, not for the Milk Control Board. In fact, there is nothing that the latter can do except to exercise due diligence in carrying out the

policy which the General Court has established, with the limitation that, of course, insofar as the Board has latitude for the exercise of discretion it is competent for it to receive arguments either that a specified area should be centralized or decentralized or that there is or is not danger to the public health shown on all the evidence, either present or prospective.

"Substantial evidence" as that phrase has been used in connection with administrative proceedings in this state, merely means responsible evidence from which a finding could reasonably be made. It does not necessarily mean the weight of the evidence nor even a preponderance of the evidence, but simply that there must be in the record before an administrative board some evidence of substance which if believed by the Board would support its findings of fact.

In the field of administrative law the "substantial evidence rule" means in layman's language that if there was substantial evidence in the record in support of the administrative agency's finding of fact, the judiciary will not upon judicial review set the finding aside even though (1) the court would not have made the same finding itself had the question been presented to it on the same evidence originally (Cf., Zinkevich v. Hankin, 97 N.H. 262, 265), or (2) the finding is against the weight of the evidence presented to the administrative agency - so long as the record shows that there was evidence to support the finding made and it was substantial as distinct from specious or without foundation. Opinion of the Justices, 98 N.H. 533, 536.

Ever since 1915, the rule in this state in regard to administrative findings of fact, with particular reference to the statutory authority for appeal (RSA 541) has been as set forth in Gratton v. Fiske, 77 N.H. 490, 493:

> ". . . In the proceeding by the petition, the case stands for argument before the court upon the 'record,' and 'upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable.' Not merely are the findings of fact to be deemed prima facie reasonable, but the findings upon all questions of fact are to have prima facie weight. If upon the evidence it appears that there is evidence upon which reasonable men could properly have found as the commission did, the conclusion can scarcely be found

to be unreasonable. Furthermore, the statute does not stop with giving prima facie weight to the findings of the commission upon questions of fact: It is provided that 'the order or decision shall not be set aside . . . unless the court is satisfied by a clear preponderance of the evidence before it that such order is unjust or unreasonable.' The distinction between the 'findings' and the 'order' is to be noted. With prima facie weight given to the findings, is the order clearly unreasonable?"

And as the New Hampshire Supreme Court held in Manchester v. Railroad, 98 N.H. 52, 53:

"Findings upon which a decision and order are to be based are the primary responsibility of the commission. The findings are to be deemed prima facie lawful and reasonable. . . ."

3. Are the Board's actions establishing areas of control in conflict with the opinion rendered in Cloutier v. Milk Control Board, 92 N.H. 199, 28A, 24 3% (1942) which states that the Board may not "restrict competition and free enterprise to a point of absolute control?"

A. No. In my opinion, the Board having found as a fact that the public health was endangered by threat to the milk supply if it did not set producer and consumer prices, its action in so doing was not restrictive to the point of "absolute control" referred to in the Cloutier case. The order there referred to by our Supreme Court in using the phrase "absolute control" (92 N.H. 199, 205) was done forbidding daily deliveries by any type vehicle whether or not rubber tired. As our highest Court there said:

". . . An order that a competitor may not take advantage of his methods and opportunities merely because those with whom he competes do not employ his methods or have his opportunities, is beyond the scope of regulative power."

On the contrary, the price control contemplated by RSA 15:17 has been expressly sanctioned by the same Court in its Opinion, 28 N.H. 497, which

opinion was cited in Chantlar v. Board, 92 N.H. 199. Areas of control are of the essence of the board's authority in the act of establishing price control to protect the supply of milk because the Board must first have found as a fact on the evidence that the danger or threat of danger to the public health existed in "a specified market" and the evidence itself must relate to the area to be controlled or decontrolled in order to be competent to all.

4. In view of the fact that no substantial evidence was presented to show public health in Candia was menaced or jeopardized by a shortage of milk of proper quality, was the Board within its rights when it assumed jurisdiction and began fixing prices in Candia and 43 other towns last year?

4. This question assumes that there was no substantial evidence presented to show danger to the public health in Candia in the December 1953 record. It further does not include reference to evidence of a threat of danger in the future: "likely to be impaired or deteriorated" to use the statutory language.

If it be assumed that there was no such evidence then presented, why of course the answer is that the Board was without authority to act. But under the decisions of the Supreme Court of New Hampshire cited above, the findings of the Milk Control Board are prima facie lawful and reasonable. As was said in Chantlar v. Board, 92 N.H. 199 at page 204:

> ". . . it is reasonable to forecast that the curtailment will become increasingly rigorous for a period measured by the uncertain continuance of the war."
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> ". . . Daily deliveries being likely in the long run to cause greater hardship and distress than less frequent delivery, an order forbidding them is in conformity with the act. . . ."

This excerpt from the Court's opinion indicates clearly that the foreseeable future is a part of the consideration for the Board in determining the effect of control in certain areas and at certain prices in relation to whether the public health is "likely to be impaired or deteriorated" in the foreseeable future if it [the Board] does not act.

In this connection, an examination of the transcript of that hearing indicates that there was some evidence from which the Board could have found a likelihood that the supply of milk to the specified market area of which Candia was a part was likely to be substantially

insecure if prices were not set by the Board. It is perhaps unfortunate that the transcript fails to show a more careful examination of general statements made. However, the testimony of Professor Bunnger had specific reference to use of price control formulas as contributing to "maintenance of stable marketing conditions"; that it would be dangerous to depart from that policy with the heavy surplus of milk that now exists in New England; that "markets in New Hampshire are directly in the path by which milk moves from the heavy supply area of Vermont to Boston"; that "if prices get out of line . . . it can easily disrupt our markets"; that "beginning with January the supply demand factor will again exert its maximum effect on the Class I price." And Mr. Kenney's testimony there included such evidence as the statement that "small towns contiguous to the larger markets which did not appear to need the regulations [during] . . . have seen a . . . sharp change in marketing practices. . ." and "organized distribution from the larger centers is going further afield to furnish the retail and wholesale needs of consumers in these small towns" - (of which Dublin was one specifically mentioned) - and requesting that "a substantial part of these unregulated areas be placed under the regulations of this Board . . ."

5. If the Board has found substantial evidence that the public health is menaced and after hearing has established control, how long may the control be kept in effect before another hearing is held to determine whether control is necessary?

A. Until they are changed from time to time by the Board after such notice and public hearing as deemed by the Board to be in the public interest. (RLA 157:7) Should any moving party have evidence that the condition warranting establishment of the price control in the first instance no longer exists, he or she may bring the fact to the attention of the Board at any time with a request that the Board hold a hearing and change the prices in accordance with such evidence. If the Board upon the receipt of such a request should decline without valid reason to hear such evidence the extraordinary remedy of mandamus is available in the courts as is review by way of certiorari to challenge any order of the Milk Control Board or any other administrative agency which can be shown not to have evidentiary foundation in fact.

There are two matters which I am anxious to make very clear in regard to the foregoing answers. First, that nothing in these answers should be construed as indicating that I am in favor of price control. The law referred to in this opinion was enacted by the General Court. It is my duty to interpret it at your request. Second, I have replied to these questions personally because it has been specifically requested that I reply personally. Assistant Attorney General Arthur K. Bean, Jr. is the regular legal adviser to the Milk Control

Board. It is my opinion that Mr. Dean has competently and ably advised and represented the Board. In these particular proceedings I am of the same opinion and, in fact, in Mr. Dean's conduct of these proceedings and his previous advices, both to the Milk Control Board and to the Governor and Council, he has acted with my full approval and agreement.

Arguments that price control of this type should be abolished or expressions of personal opinion relative to the merits of price control are beyond the authority or jurisdiction of the Milk Control Board. Such arguments are for the Legislature in an appeal to eliminate this extraordinary power of the Board. For the Board to entertain such arguments before it might perhaps be likened to arguments before the State Public Utilities Commission that regulation of the rates of the Telephone Company should not be subject to the Commission's control. I am sure the Public Utilities Commission would not be required to receive such argument.

The Milk Control Board in New Hampshire is composed of citizens of New Hampshire appointed by the Governor with the advice and consent of the Council for a fixed term of years. As long as milk control is the law in New Hampshire (RSA 183) the Board is required by law to carry out its duties and the Attorney General is required by law to give it legal advice. Legislative acts are presumed to be constitutional. Repeal or amendment can only be by the General Court. Until such an event it is the duty of the Board to establish price control of milk whenever the Board receives evidence that in any specified market area the public health is menaced or jeopardized by the loss or substantial lessening of a supply of milk of proper quality in that area OR that the public health is LIKELY TO BE impaired or deteriorated by the prospect of the occurrence of such a condition in the foreseeable future.

Respectfully,

Louis C. Wyman
Attorney General

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